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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

GARRIT BATES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*,

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTION PRESENTED

Must the United States of America prove fraudulent intent on the part of the defendant, Garrit Bates, as an essential element of the crime of knowingly and willfully misapplying federally insured funds, proscribed by 20 U.S.C. §1097(a)?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

GARRIT BATES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*,

Petition for Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

Mr. Garrit Bates respectfully petitions for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Appendix A, *infra*, pp.A-1 to A-13) is reported at 96 Fed. 3d 964. The opinion of the District Court (Appendix B, *infra*, pp. A-14 to A-23) is unreported.

JURISDICTION

The Court of Appeals entered its judgement on September 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

20 U.S.C. §1097(a) provided, prior to its amendment in 1992, that:

> Any person who knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery any funds, assets, or property provided or insured under the subchapter and part C of subchapter I of Chapter 34 of Title 42 shall be fined not more than $10,000 or imprisoned for not more than Five (5) years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud, false statement, or forgery does not exceed $200, the fine shall not be more than $1,000 and imprisonment shall not exceed One (1) year, or both.

STATEMENT OF THE CASE

A. Factual Background

Mr. Garrit (Jerry) Bates, began employment with Education America, Inc., in January of 1986. Education America, Inc., operated vocational and technical schools located in Indiana and Wisconsin. Mr. Bates held the nominal title of vice-president of Education America, Inc., with his primary responsibility being overseeing student recruitment at various schools. Mr. Bates had no ownership interest in Education America, Inc.

In late 1988 or early 1989, Education America, Inc., realized that Acme Institute of Technology, located in South Bend, Indiana, ("Acme") was experiencing financial difficulty. As a result of this difficulty, Mr. Bates was given the additional responsibility in 1989 of determining which bills of Acme's were to be paid first, in an effort to steer the school

through the financially troubled times. Ultimately, the efforts of Mr. Bates and others involved at Acme and Education America, Inc., were unsuccessful in resuscitating the financial health of the school, with Acme ceasing operations on June 5, 1990. At the time it ceased operations, Acme had unpaid refund liability under the guaranteed student loan program which was substantial.

In January 1991, Mr. Bates began employment with the Indiana Public Employees Retirement Fund where he presently remains employed. Mr. Bates voluntarily cooperated with the investigation of the Department of Education into the refund liability of Acme throughout the calendar year of 1992.

B. Procedural History

Mr. Bates was indicted by a federal grand jury on September 8, 1994. The indictment charged Mr. Bates with knowingly and willfully misapplying specified amounts of federally guaranteed student loan funds on twelve (12) separate occasions between January 15 and June 15, 1990, in violation of 20 U.S.C. §1097(a) and 18 U.S.C. §2. Mr. Bates moved to dismiss the indictment on February 7, 1995. Mr. Bates contended that the indictment did not reveal any alleged facts which would support a conclusion that Mr. Bates had converted any funds guaranteed or furnished by the United States; and, that the indictment failed to allege that Mr. Bates intended to fraudulently convert funds guaranteed or owned by the United States Department of Education.

On April 17, 1995, the United States District Court entered its memorandum and order dismissing the indictment, agreeing with Mr. Bates that the indictment had failed to allege fraudulent intent on the part of Mr. Bates as an essential element of the crime. Specifically, the District Court found that the indictment was insufficient on its face in that each count of the indictment failed to state that Mr. Bates misapplied protected funds "with an intent to injure or defraud the United States."

On May 17, 1995, United States of America filed its notice of appeal. After submission of briefs, the matter was argued on February 12, 1996, before the United States Court of Appeals for the Seventh Circuit. The opinion of the Seventh Circuit was issued on September 20, 1996, reversing the United States District Court by vacating the judgement of the Court dismissing the indictment and reinstating the prosecution. In so doing, the United States Court of Appeals found that the specific intent of a defendant to injure or defraud the United States is not an element of the offense charged.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Seventh Circuit acknowledged that its opinion in this case conflicts with the Eleventh Circuit Court of Appeals in *United States v Kammer*, 1 F. 3d 1161 (1993). (See, Appendix A, p. A-7) Unpublished opinions issued in at least two (2) other circuit courts of appeal illustrate further conflict, including attempts to

factually distinguish *Kammer*, as well as inconsistency in the government's application of the element of fraudulent intent to the prosecution of alleged acts of misapplication of funds proscribed by §1097(a). At the district court level, indictments involving misapplication of funds in violation of §1097(a) are proliferating and undoubtedly number thousands of defendants nationwide. The need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance since there are systemic reasons why few defendants are ever in a position to present this issue of statutory construction for appellate review. Moreover, the decision below is erroneous and the issue that it addresses is important.

I.

The Court of Appeals Construction of 20 U.S.C. §1097(a) Conflicts with the Construction of §1097(a) by the Eleventh Circuit Court of Appeals.

In *Kammer*, the Eleventh Circuit Court of Appeals faced the identical issue faced by the Seventh Circuit Court of Appeals in the instant case. The Eleventh Circuit held that to prove the crime of misapplication of funds as proscribed by 20 U.S.C. §1097 (a), "... the government must prove (1) a conversion of the property to the use of the defendant or a third party, and (2) fraudulent intent." See, 1 F. 3d 1161, 1165. However, the Seventh Circuit in this case expressly rejected the Eleventh

Circuit's holding, instead concluding

> that intent to injure or defraud the United States is not an element of willful misapplication under §1097(a). Rather, the government must prove that the defendant misapplied-i.e., converted-Title IV funds and that he did so knowingly and willfully.
> (Appendix A, p. A-10).

This issue was also recently addressed by the Ninth Circuit Court of Appeals in an unpublished disposition of the matter of *United States v Bailie*, 99 F. 3d 1147; 1996 WL 580350. In *Bailie*, the Ninth Circuit failed to find an abuse of discretion in the district court's refusal to give a defendant's proposed jury instruction which stated that "an intent to defraud is an intent to deceive or cheat." The Ninth Circuit noted that the defendant had failed to properly place before the court the issue of whether an intent to defraud was an element of the crime of misapplication. However, the Ninth Circuit did find that the district court's instructions to the jury did not misstate the elements of the statutory crime of misapplication of funds under §1097(a) so as to mislead the jury. The Ninth Circuit also indicated that they were not persuaded by the holding of *Kammer* primarily because the government in *Bailie* pursued a different factual theory to establish a misapplication of funds than the factual theory promoted by the government in *Kammer*.

The *Bailie* case illustrates that without guidance from this Court various circuit courts of appeals will be tempted to engage in *ad hoc* formulation of legal principles to justify a particular

court's perspective of the equities of the factual circumstances of a given case.

Further, the Fourth Circuit Court of Appeals has upheld the conviction of a defendant for misapplication of funds in violation of §1097(a) by holding that the evidence supported a jury finding of "the requisite showing of specific intent for conviction of misapplication of student loan funds." See, *United States v. Robinson* 915 F. 2d 1566; 1990 WL 153988. In *Robinson*, the government specifically agreed that specific intent was an element of the crime of misapplication of funds under §1097(a), thus differing from the government's position in this case.

A split of opinion on an important question where two (2) courts of appeal had previously reached contrary results has been found by this Court to be sufficient to grant certiorari. See, *United States v Muniz* 374 U.S. 150, 151 (1963). The foregoing demonstrates such a split of opinion among the circuit courts of appeal; this Court should grant certiorari to review these important conflicts.

II.

The Question Presented is Important.

The question of whether fraudulent intent on the part of a defendant is an essential element of the crime of misapplication of funds as proscribed by 20 U.S.C. §1097(a) is indeed important as it speaks directly to the basic underlying tenet of criminal

culpability, e.g. an evil purpose. Further, in addition to Mr. Bates, there are apparently thousands of defendants who face the possibility of indictment for misapplication of funds in violation of §1097(a), all of whom could be potentially affected by resolution of this issue.

This Court has examined the history of criminal culpability in American jurisprudence and has noted that there has been unanimous adherence to a central thought that " ... wrongdoing must be conscious to be criminal ... ." See, *Morissette v United States* 342 U.S. 246, 252 (1952). This Court further acknowledged that courts of various jurisdictions had utilized such concepts as fraudulent intent and *mens rea* to signify an evil purpose or mental culpability and "... protect those who are not blameworthy in mind from conviction of infamous common law crimes." *Id.* The construction of the crime of misapplication of funds under §1097(a) applied by the Eleventh Circuit would continue this noble tradition of protecting those who are not blameworthy in mind from the harshness of criminal penalty and the stigma of criminal conviction. The construction of §1097(a) urged by the Seventh Circuit, by eliminating the element of fraudulent intent from the crime of misapplication of funds, would erode this tradition of American criminal justice and serve to shift the focus of criminal culpability from the state of mind of an alleged wrongdoer to focus merely on the outcome and result of various acts as the basis for finding criminal culpability. Such an erosion blurs meaningful distinction between negligent

conduct and criminal conduct. For this reason alone, the issue is important.

The issue is also important by virtue of the effect its resolution will have not only upon Mr. Bates but upon actual or potential defendants who are the subject of investigations for misapplication of funds pursuant to §1097(a). An estimate that these actual and potential defendants would number in the thousands is supported by testimony of a government witness in the case of *United States v Ross*, 948 F. 2d 1283; 1991 WL 240481 (4th Cir.,1991). In *Ross* evidence was adduced indicating that at one school in one city approximately One Hundred (100) individuals were investigated for misapplying funds in violation of §1097(a), with over Fifty (50) of those individuals being indicted. Even without the ready availability of precise numbers, a common sense knowledge of the number of institutions of post-secondary education within the Unites States which participate in Department of Education programs offering federally insured funding would surely support an estimate of thousands of potential defendants in any given year across the United States. The magnitude of the application of this criminal statute also renders importance to the issue presented to the court for consideration.

This Court should grant the petition to ensure consistent application of the law to those citizens under investigation for possible violation of §1097(a).

III.

The Decision of the Court of Appeals is Erroneous and Confuses the Law in Stating the Working Definition of "Willful Misapplication".

Mr. Bates contends that the decision of the Seventh Circuit in this case is erroneous and that the working definition of willful misapplication under §1097(a) supplied by the court merely confuses, rather than clarifies the law. The opinion is erroneous in that (1) it eliminates the *mens rea* necessary to elevate the alleged conduct complained of to the level of criminal activity; (2) the opinion contravenes the rule of lenity in statutory construction; (3) the opinion ignores the impact of the 1992 amendment to 20 U.S.C. §1097(a), which specifically criminalized the act of failing to make refunds of unearned student loans. The working definition is also confusing and for that reason could lead to violations of civil regulations forming the basis of criminal convictions.

The Honorable Judge Reinhart of the Ninth Circuit Court of Appeals correctly asserted in his vigorous dissent in *Bailie, supra*, p. 9, that the "... majority wrongly concludes that 20 U.S.C. §1097(a) imposes no intent requirement." In the following passage, Judge Reinhart succinctly demonstrates that to omit a *mens rea* requirement to prove misapplication of funds in violation of §1097(a) is in contravention of existing precedent of this Court:

> The Supreme Court has repeatedly interpreted criminal statutes as having a *mens rea* requirement, absent congressional direction to the contrary. See, e.g., *Liparota v. United States*, 471 U.S. 419, 433-34 (1985). To do otherwise, as the majority does here, would permit a jury to convict a defendant without first finding that the defendant intended to do anything illegal. The Supreme Court, however, has repeatedly declined to construe criminal statutes as imposing strict liability. See, *United States v. United States Gypsum, Co.*, 438 U.S. 422, 436-37 ("[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence," *Dennis v. United States*, 341 U.S. 494, 500 (1951)); *Morissette v United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").
>
> *Bailie*, p. 9

The holding of the Seventh Circuit in this case is also in contravention of this Court's precedent of applying the rule of lenity in statutory construction. Although the Seventh Circuit, in 1996 acknowledged that " ... ambiguity concerning the meaning of statutory language 'should be resolved in favor of lenity,' ... " (see, *United States v. Ranum* 96 F. 3d 1020, 1030), the Seventh Circuit did not apply the rule of lenity in this case. In failing to apply the rule of lenity, the Seventh Circuit ignored the precedential value of Justice Brennan's statement that "... requiring *mens rea* is in keeping with our long standing recognition of the principle that 'ambiguity concerning the ambit of criminal statute should be resolved in favor of lenity' ...". *Liparota, supra* 427.

Although "... the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress ..." (*Id*, p. 427), the legislative history of §1097(a) indicates that Congress has acknowledged the existence of a *mens rea* requirement in the crime of misapplication of funds. As has been recognized by at least one (1) United States District Court, in 1992 Congress amended §1097(a) to include "... provisions criminalizing the failure to refund funds, assets, or property provided or insured under the Title IV programs." See, *California Cosmetology Coalition v Riley* 871 F.Supp. 1263, 1265. Prior to the 1992 amendments, the failure to refund Title IV funds were necessarily prosecuted, as in this case, as a misapplication of funds under §1097(a). The 1992 amendment of §1097(a) by Congress imposes strict criminal liability for failing to make refunds.[1] This indicates Congress' tacit acknowledgement that the crime of misapplication of funds does not impose strict criminal liability, for had it so done the 1992 amendment would have been unnecessary. Instead, a greater burden of proof is imposed upon the prosecution; that being proof of the particular conduct complained of and evidence of *mens rea*.

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1. 20 U.S.C. §1097(a), after its amendment in 1992, reads:
Any person who knowingly and wilfully embezzles, misapplies, steals, obtains by fraud, false statement or forgery, or fails to refund any funds, assets or property provided or insured under this subchapter and part C of subchapter I of chapter 34 of Title 42 or attempts to so embezzle, misapply, steal, obtain by fraud, false statement or forgery or fail to refund any funds, assets or property shall be fined not more than $20,000.00 or imprisoned for not more than 5 years, or both except if the amount so embezzled, misapplied, stolen, obtained by fraud, false statement, or forgery, or failed to be refunded does not exceed $200.00, then the fine shall not be more than $5,000.00 and imprisonment shall not exceed 1 year, or both.

Finally, the Seventh Circuit opinion in this case should not stand because the "working definition" of willful misapplication under §1097(a) which is provided is so confusing that the simple violation of a civil regulation could result in a conviction for criminal conduct. The working definition of the Seventh Circuit in this case

> requires the government to allege and prove that the defendant consciously, voluntarily, and intentionally exercised unauthorized control or dominion over federally provided or guaranteed Title IV funds that interfered with the rights of the funds true owner(s), for the use and benefit of the defendant or a third person, while knowing that such an exercise of control or dominion over the funds was a violation of the law. (See, Appendix A, p. A-11)

The first part of the working definition essentially states the crime of conversion. See, *United States v. Jakeway* 783 F. Supp. 590, 597. The working definition then further requires that the criminal conversion be committed with the knowledge that the criminal conversion was a "violation of the law." This final element in the Seventh Circuit's working definition truly begs the question - - -, what law must the defendant know he is violating?

An attempt to apply this working definition to the facts of any case would be fraught with a risk that a jury would consider a knowing violation of a civil regulation as sufficient to impose criminal liability. This type of conclusion would be erroneous and lead to unjust results, for even though violation of a civil regulation may be used to establish motive or intent,

violation of a civil regulation is not admissible where it is used to supply a crucial element of the government's case. See, *United States v. Wolf* 820 Fed 2d 1499, 1504-05 (9th Cir. 1987); *cert. denied* 45 U.S. 960 (1988).

It is quite conceivable that the working definition would allow the jury to look to the violation of a single civil regulation to supply both the "unauthorized" component of "the exercise of dominion or control", and the finding that the criminal conversion was a knowing violation of the law. This thinking would inevitably result in a knowing violation of a civil regulation being punished as criminal conduct. The working definition supplied by the Seventh Circuit is, in effect, so confusing that it is unworkable and unjust.

This Court should grant Mr. Bates' petition to resolve the conflict among the circuits and correct the Seventh Circuit's error.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 95-2203
UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

GARRIT BATES,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 94 CR 68—Robert L. Miller, Jr., *Judge.*

ARGUED FEBRUARY 12, 1996—DECIDED SEPTEMBER 20, 1996

Before CUDAHY, FLAUM, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* After Garrit Bates was charged with twelve counts of willfully misapplying federally guaranteed Title IV student aid funds, he filed a pretrial motion to dismiss the indictment as insufficient. Specifically, he argued that both conversion and intent to injure or defraud the federal government are elements of the offense of willfully misapplying financial aid monies and that the indictment had failed to adequately allege either one. The district court granted his motion to dismiss after determining that the indictment failed to allege intent to injure or defraud the United States, and the government appeals to this court. Because we find that a conviction

for willful misapplication of Title IV funds does not require proof of the defendant's intent to injure or defraud the United States, and that the indictment is otherwise sufficient, we vacate the judgment of the district court and reinstate the prosecution.

I. History

Given that the district court determined that the indictment was insufficient on its face, for this appeal we take the facts as they are alleged in the indictment, which are set out below. James and Laurenda Jackson are the owners and operators of Education America, Inc., a for-profit consulting and management firm for various technical and vocational schools. In December 1986, the Jacksons acquired ownership of the Acme Institute of Technology, a not-for-profit technical school located in South Bend, Indiana. After the acquisition, the Jacksons appointed Bates, who was vice president of Education America at the time, to act as Acme's chief financial officer and treasurer of the Acme board of trustees.

On April 30, 1987, Mr. Jackson, acting as president of Acme, signed a program participation agreement with the Department of Education. Under the agreement, Acme became authorized to receive student loan checks through the Title IV federal Guaranteed Student Loan ("GSL") program, but participation in the program was contingent upon (1) Acme's continued accreditation by an approved accrediting association, and (2) Jackson's promise to comply with all statutes and regulations governing the GSL program. Around the same time, Bates signed a similar participation agreement for a different school owned by Education America, and he therefore presumably understood the responsibilities imposed by the Acme participation agreement.

Through the GSL program, banks and other private financial institutions would lend money to Acme students for tuition and other educational expenses. The federal government's role was to administer the loan program and

guarantee payment of the loans in the event any of the student borrowers defaulted. Loan checks were mailed directly to Acme and, once endorsed, were credited against the student's tuition debt. However, if a student with a GSL withdrew from Acme prior to completion of a term, federal regulations required Acme to refund a portion of the loan proceeds to the lender within 30 or 60 days from withdrawal (depending on the date of the loan application), which was then to be deducted from the amount owed. Of course, if loan refunds were not made, the student—and, in the event of default, the government—would nonetheless remain liable to the lender for the full amount of the loan.

On April 14, 1988, Mr. Jackson sent a letter to the director of Acme instructing him (1) to remit 10 percent of Acme's gross receipts from the previous month to Education America as a management fee, and (2) to arrange for a specified monthly salary to be paid by Acme to the Jacksons. The letter explained that if these required payments caused Acme to experience a cash shortfall, Education America would loan money back to Acme in order to cover the discrepancy. As chief financial officer of Acme, Bates had the authority to determine which of Acme's bills would be paid as they came due, and he repeatedly gave these fee and salary payments to Education America and the Jacksons priority over refunds to lenders of student loan monies for withdrawn students. In doing this, Bates would specifically direct Acme employees not to make required student loan refunds. By the end of September 1988, Acme had amassed a GSL refund debt of approximately $55,000.

In late 1988 or very early 1989, Education America officials directed Acme to discontinue using a special bank account that was designed to segregate unearned student loan monies (those that should have been earmarked for refunds) from the school's general funds account. When Acme's refund arrearage had grown to around $68,000 by January 1989, Acme's financial aid director sent a letter to Mr. Jackson frustratedly pointing out the seriousness

of failing to pay refunds of Title IV monies. In March 1989, Acme's unpaid student loan refunds totaled $85,000. That month, Bates notified Acme's financial aid director, at her request, that she was absolved of all legal responsibility concerning refunds on GSLs and that such refunds would be "solely the responsibility and decision of the corporate office."

In April 1989, the National Association of Trade and Technical Schools ("NATTS"), a national accrediting association, performed an on-site audit of Acme for the purpose of determining whether it should continue to accredit the school. In its May 1990 report to the Department of Education, NATTS found that Acme had "inadequately demonstrated its ability to make appropriate and timely refunds," and that it had "loaned substantial amounts of money" and engaged in the "upstreaming" of management fees to Education America and its owner, Mr. Jackson, who also happened to be Acme's president and chairman of the board of trustees.

After losing its accreditation, Acme received notice from the Department of Education that effective March 8, 1990, Acme was no longer eligible to participate in the GSL program. On June 5, 1990, Acme closed its doors, having accrued a total student loan refund debt of $139,649, not including interest and certain special allowances.

On September 8, 1994, a federal grand jury handed down a twelve-count indictment against Bates. Following a recitation of the facts set out above, the indictment charges that on twelve separate occasions between January 15 and June 15, 1990, Bates knowingly and willfully misapplied specified amounts of federally guaranteed student loan funds, in violation of 20 U.S.C. § 1097 and 18 U.S.C. § 2. At the time of Bates's alleged wrongdoing in 1990, § 1097(a) declared guilty of a crime "[a]ny person who knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery any funds, assets, or property provided or insured under [Title IV of the Higher Education Act of 1965] . . . ." 20 U.S.C. § 1097(a).

On February 7, 1995, Bates filed a motion to dismiss the indictment. The memorandum in support of his motion argued first that conviction under § 1097(a) for willful misapplication of student aid funds requires proof of both conversion and the defendant's intent to injure or defraud the United States, and second, that the indictment failed to allege sufficient facts to constitute conversion and neglected to allege intent to injure or defraud the United States at all. The district court agreed that § 1097(a) requires proof of the intent to injure or defraud the government and that the indictment had failed to allege such intent, and it therefore granted the motion and dismissed the indictment.

II. Analysis

The government appeals from the judgment of dismissal, arguing (1) that a conviction for willful misapplication of Title IV funds does not require that the government demonstrate the defendant's intent to injure or defraud the United States, and (2) that regardless of whether § 1097(a) requires a showing of such intent, the indictment was facially sufficient. We address these separate arguments in turn. Our review of a district court's determination concerning the facial sufficiency of an indictment is *de novo*. *Frank v. United States*, 914 F.2d 828, 830 (7th Cir. 1990) (citing *United States v. Bucey*, 876 F.2d 1297, 1301-02 (7th Cir.), *cert. denied*, 493 U.S. 1004 (1989)). We likewise engage in plenary review of a district court's statutory interpretation. *United States v. Shriver*, 980 F.2d 456, 459 (7th Cir. 1992).

A. Intent to Injure or Defraud the United States

A basic tenet of criminal law provides that *actus non facit reum nisi mens sit rea*, meaning an act does not make one guilty unless his mind is guilty. Thus, at common law, nearly all crimes required proof that the defendant not only committed a wrongful act, but that he did so with the requisite *mens rea*, or culpable mental state.

As history has witnessed the statutory codification of criminal offenses, enacting legislatures have employed such words as "intentionally," "willfully," or "purposefully" to signify the common law requirement of mental culpability. *See Morissette v. United States*, 342 U.S. 246, 251-52, 72 S. Ct. 240, 244 (1952).

But criminal intent (even when differentiated from such other, lesser mental states as objective knowledge, recklessness, or negligence) is an elusive concept—some crimes may demand proof of only the defendant's *general* intent to engage consciously and voluntarily in the proscribed conduct, while other crimes may additionally require proof of the defendant's *specific* intent to effectuate a particular result. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.5, at 302-18 (1986 & Supp. 1996). On this appeal, we must reach the question we declined to answer in *United States v. Ross*, 77 F.3d 1525, 1546 (7th Cir. 1996): whether conviction under 20 U.S.C. § 1097(a) for willfully misapplying federally insured student aid funds requires the government to allege and prove the defendant's specific intent to injure or defraud the United States.

In *Morissette*, the Supreme Court instructed:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

342 U.S. at 263, 72 S. Ct. at 250. Congress has utilized the expression "willful misapplication" in a host of criminal statutory provisions. And thus, although few of these crimes are (as in *Morissette*) centuries old, we have much to which we may turn by way of analogy in discerning the elements of willful misapplication, as the term is used in § 1097(a).

Bates contends, citing *United States v. Kammer*, 1 F.3d 1161, 1165 (11th Cir. 1993),* and *United States v. Jakeway*, 783 F. Supp. 590, 597 (M.D. Fla. 1992), that we should look for guidance to our interpretation of 18 U.S.C. § 656, which prohibits bank insiders from, among other things, willfully misapplying the bank's funds. This court, like the Eleventh and most of our other sister circuits, has defined the crime of willfully misapplying bank funds to require proof (1) that the defendant intentionally converted bank funds to his own use or the use of another, and (2) that the defendant did so with the specific intent to injure or defraud the bank. *United States v. Crabtree*, 979 F.2d 1261, 1266-67 (7th Cir. 1992), *cert. denied*, 510 U.S. 878 (1993); *United States v. Bruun*, 809 F.2d 397, 408 (7th Cir. 1987). Either the intent to injure *or* the intent to defraud will suffice, and they are not the same. *United States v. Bates*, 852 F.2d 212, 215 (7th Cir. 1988); *United States v. Angelos*, 763 F.2d 859, 861 (7th Cir. 1985). For the defendant to have acted with the intent to injure the bank, "it is sufficient that the loan officer engaged in acts, the natural tendency of which would be to injure the bank." *Crabtree*, 979 F.2d at 1268 (quoting *Bruun*, 809 F.2d at 408). Intent to defraud the bank, on the other hand, "means to take financial advantage of a confidential relationship and does not require any intent to injure the bank." *Bates*, 852 F.2d at 215-16 (citing *Angelos*, 763 F.2d at 861-62).

The government concedes that willful misapplication of federally guaranteed student aid funds requires the defendant to have intentionally converted such funds to his own use or the use of a third party, but it argues that the defendant's specific intent to injure or defraud the United States is not an element of the offense. We agree.

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* Because this opinion conflicts with the Eleventh Circuit's holding in *Kammer*, it was circulated before release to all judges in active service pursuant to 7th Cir. R. 40(e). No judge requested a rehearing en banc.

The mere fact that we have interpreted willful misapplication of bank funds to require both intentional conversion *and* the intent to injure or defraud the bank does not necessitate the conclusion that specific fraudulent or injurious intent is part and parcel of "willful misapplication." In fact, quite the opposite is true. Intent to injure or defraud the bank is not subsumed within the phrase "willful misapplication," but rather is a separate and distinct component of § 656. *See Crabtree*, 979 F.2d at 1266 (noting that § 656 requires both "that the defendant willfully misapplied funds of the bank" and that he did so "with the intent to injure or defraud the bank"). The point is further illustrated by the Fifth Circuit's recent approval of the following instructions in a bank fund misapplication case:

> To willfully misapply a bank's money or property means an intentional conversion of such money or property to one's own use and benefit, or for the use and benefit of another, knowing that one had no right to do so.
>
> To act with the intent to defraud means to act with an intent to deceive or cheat someone, ordinarily for the purpose of causing some financ[ial] loss to another or bringing about some financial gain to oneself.

United States v. Giraldi, No. 94-60602, 1996 WL 339177, at *8 (5th Cir. June 19, 1996). Thus, intent to injure or defraud is an offense element that must be proved *in addition to* willful misapplication in a § 656 prosecution.

It is true that the language of § 656, like that of § 1097(a), does not explicitly require the defendant to have acted with specific fraudulent or injurious intent. However, there is a historical rationale for reading into § 656 the requirement of the defendant's intent to injure or defraud the bank. In *Bates*, we explained:

> The current statutory language does not expressly require any proof of [fraudulent or injurious] intent. Originally the statute did require proof of intent to "injure or defraud" the bank or "deceive" a bank officer but these words were inadvertently dropped in the course of a technical revision of the criminal code. To avoid making every unauthorized loan by a bank officer a willful misapplication of bank funds, courts, including our own, read the missing words back into the section.

852 F.2d at 215 (citing *Angelos*, 763 F.2d at 861; *United States v. Shively*, 715 F.2d 260, 266 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)). Section 1097(a) has never included a requirement that the defendant have acted with an intent to injure or defraud the government, and with no textual or historical basis for doing so, we are reluctant to read such a requirement into the statute.

Our reluctance is bolstered by this circuit's prior analysis of 18 U.S.C. § 665, another statute prohibiting the willful misapplication of federal funds—specifically, Comprehensive Employment and Training Act ("CETA") funds. In *United States v. Hamilton*, a defendant charged under § 665 with willful misapplication of CETA funds argued that he could not be convicted because he did not know the monies he misapplied were federal funds. 726 F.2d 317, 320 (7th Cir. 1984). Under § 656, a defendant cannot be convicted if he did not know the funds were the bank's because he must have acted with intent to injure or defraud the bank, and thus Hamilton urged this court to pattern our interpretation of § 665's requirements after those of § 656. *Id.* We refused to employ such an analogy, explaining that "we need not wander that far afield, since a closer analogy is found in the general section concerning embezzlement of public money, 18 U.S.C. § 641." *Id.* (citing *United States v. Coleman*, 590 F.2d 228 (7th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979)).

Section 641, as construed in *Morissette*, requires only that the defendant intentionally converted public funds to his own use and benefit or to that of a third person. 342 U.S. at 263, 270-72, 72 S. Ct. at 250, 254. Thus, in *United States v. Brown*, we held that " 'misapplication of funds' for purposes of § 665 mean[s] the conversion of funds to

the defendant's own use or the use of another," and that "the conversion of CETA funds for the use of uncertified workers when the defendant knows of their uncertified status is a willful misapplication of funds for purposes of § 665." 742 F.2d 363, 366-67 (7th Cir. 1984). *But see United States v. Garcia*, 751 F.2d 1033, 1037 (9th Cir. 1985) (holding that intent to injure or defraud the United States is an essential element of willful misapplication under § 665). In *Hamilton*, we declined to read into § 665 a § 656-esque requirement that the defendant have acted with intent to injure or defraud the United States, holding:

> We believe that Congress, through § 665, desired to afford federal protection to the large sums of federal money entrusted to nonfederal agencies to accomplish the purposes of CETA, and did not intend to limit this protection to situations where the defendant was aware of a federal interest in the funds.

726 F.2d at 320. This reasoning applies equally here, where Congress has sought through § 1097(a) to provide broad protection for Title IV student financial aid funds entrusted to private educational institutions.

We conclude, therefore, that intent to injure or defraud the United States is not an element of willful misapplication under § 1097(a). Rather, the government must prove that the defendant misapplied—i.e., converted—Title IV funds and that he did so knowingly and willfully. The Supreme Court has defined willfulness as the "voluntary, intentional violation of a known legal duty." *United States v. Pomponio*, 429 U.S. 10, 12-13, 97 S. Ct. 22, 24 (1976). Conversion is an "unprivileged interference with the owner's possession and enjoyment of a chattel." *Kerrigan v. American Orthodontics Corp.*, 960 F.2d 43, 45 (7th Cir. 1992); *see also Ross*, 77 F.3d at 1546 (quoting *Kammer*'s definition of conversion as "an act of dominion or control over the property that seriously interferes with the owner's rights," 1 F.3d at 1165). *Morissette* explained:

> Conversion . . . may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact.

342 U.S. at 271-72, 72 S. Ct. at 254. Thus, as a working definition, willful misapplication under § 1097(a) requires the government to allege and prove that the defendant consciously, voluntarily, and intentionally exercised unauthorized control or dominion over federally provided or guaranteed Title IV funds that interfered with the rights of the funds' true owner(s), for the use and benefit of the defendant or a third person, while knowing that such an exercise of control or dominion over the funds was a violation of the law.

B. Sufficiency of the Indictment's Allegation of Conversion

In his motion to dismiss, reiterated on appeal, Bates argued that the indictment was insufficient first because it did not allege intent to injure or defraud the government, and second because it failed to allege sufficient facts to constitute conversion. Having decided that intent to injure or defraud is not an element of § 1097(a), this leaves only Bates's argument that the indictment failed to adequately charge conversion.

Facial sufficiency is not a high hurdle. Indictments need not exhaustively describe the facts surrounding a crime's commission nor provide lengthy explanations of the elements of the offense. FED. R. CRIM. P. 7(c)(1) instructs that "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential

facts constituting the offense charged." We have held that "[a]n indictment is sufficient if it: (1) states all the elements of the offense charged; (2) informs the defendant of the nature of the charge, enabling the defendant to prepare a defense; and (3) enables the defendant to plead the judgment as a bar to later prosecution for the same offense." *U.S. v. F.J. Vollmer & Co., Inc.*, 1 F.3d 1511, 1518 (7th Cir. 1993) (citing *United States v. James*, 923 F.2d 1261, 1265 (7th Cir. 1991)), *cert. denied*, 114 S. Ct. 688 (1994). "Generally, an indictment is sufficient when it sets forth the offense in the words of the statute itself, as long as those words expressly set forth all the elements necessary to constitute the offense intended to be punished." *United States v. Hinkle*, 637 F.2d 1154, 1157 (7th Cir. 1981).

Bates argues that the indictment fails to adequately set forth the elements of conversion because it does not charge that his handling of federally guaranteed funds was in any way "unauthorized." Yet, the indictment alleges (1) that the school had a duty to refund unearned student loans to the lender within thirty to sixty days; (2) that due to the participation agreement and the warnings of Acme's financial aid director, Bates knew of this duty; (3) that Bates specifically directed Acme personnel not to make refunds that were required by law; and (4) that Bates instead made management and salary payments to the Jacksons and to Education America, of which Bates happened to be vice president. These factual allegations clearly make out a charge that Bates's handling of Acme's federally guaranteed student loan funds was unauthorized.

Bates also contends, citing *Hinkle*, 637 F.2d at 1158, that the indictment is insufficient because the term "misapplication" is intrinsically vague. In *Hinkle*, we determined that an indictment charging use of a communication device to facilitate the commission of a felony involving a controlled substance, in violation of 21 U.S.C. § 843(b), was insufficient to inform the defendant of the nature of her alleged crimes. *Id.* Bates argues that "misapplication" is as uninformative as "facilitation." But Bates misunderstands the holding in *Hinkle*. The fatal ambiguity in *Hinkle* was that the indictment, although following the language of the statute in alleging the offense of facilitating a felony involving a controlled substance, failed to identify either the felony facilitated or the controlled substance involved. *Id.* The "facilitation" charge was duplicitous because it could have referred to any one of a number of criminal acts that the defendant may have committed.

Here, on the other hand, Bates has been charged with a distinct, identifiable offense: he willfully misapplied specified amounts of federally guaranteed Title IV funds on twelve specified occasions. Although admittedly bareboned, the indictment in this case included all of the requisite elements of willful misapplication under § 1097(a), and it certainly alleged sufficient facts to apprise Bates of the charges against him.

The judgment of the district court dismissing the indictment is VACATED, and the cause is REMANDED to the district court for further proceedings consistent with this opinion.

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APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	CAUSE NO. 3: 94-CR-68RM
	)	
GARRIT BATES	)	

MEMORANDUM AND ORDER

Defendant Garrit Bates' moves to dismiss the indictment against him and for oral argument. Because the parties have adequately briefed the motion to dismiss, the court denies the motion for oral argument. For the following reasons, the court grants the motion to dismiss.

Mr. Bates was indicted on September 8, 1994 on twelve counts of aiding and abetting the knowing and willful misapplication of federally insured funds pursuant to 20 U.S.C. § 1097(a), 18 U.S.C. § 2. Mr. Bates contends that the facts alleged in the indictment could not support a finding that the essential elements of § 1097(a) have been met. The government disagrees both with Mr. Bates's version of the essential elements and with his conclusion that the indictment fails to allege facts that could satisfy those essential elements.

The indictment charges that Mr. Bates was the Treasurer of the Board of Trustees of the Acme Institute of Technology, a not-for-profit technical school owned by James and Laurenda Jackson. Mr. Bates also was Vice-President of Education America,

Inc., which the Jacksons also owned.

Acme students were eligible for guaranteed student loans ("GSLs") under a program enacted by Congress and administered by the Department of Education. If a student withdrew from Acme before a term's completion, federal regulations required Acme to refund a portion of loan proceeds to the lending institution. Federal regulations required that the refunds be paid within 30 or 60 days of the student's withdrawal.

The indictment charges that beginning in 1987, decisions made by the Jacksons and Mr. Bates resulted in Acme beginning a practice of not making refunds on GSLs. In late 1988 or 1989, Education America officials directed Acme to discontinue the use of a special bank account that segregated the refunds from the general account. Around January 1989, according to the indictment, Mr. Bates determined on a week-to-week, or sometimes day-to-day, basis which bills would or would not be paid with the understanding that payments to the Jacksons took precedence over payment of refunds. The indictment alleges that Mr. Bates specifically instructed Acme employees not to make student loan refunds.

On March 13, 1989, Mr. Bates, as Executive Vice-President of Education America, allegedly notified the Financial Aid Director that, pursuant to her request, she was released from all responsibility concerning refunds on GSLs. The letter stated that the refund of any unearned tuition was "solely the responsibility and decision of the corporate office." The Financial Aid Director allegedly was directed, however, to continue to prepare refund

documents to be approved by the corporation for payment.

Effective March 8, 1990, Acme no longer was eligible to participate in the GSL program because Acme had lost its accreditation from the National Association of Trade and Technical Schools. On June 5, 1990, Acme ceased operation and closed its doors; at that time, the amount of unrefunded GSL funds allegedly had accrued to a total of $139,649.00 while Mr. Bates was chief financial officer at Acme.

The indictment then charges, in twelve different counts, that on January 15, January 16, January 29, April 2, twice on April 27, May 7, May 11, May 18, June 9, June 12 and June 15 of 1990, Mr. Bates knowingly and willfully misapplied funds provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code in violation of 20 U.S.C. § 1097(a) and 18 U.S.C. § 2.

The indictment charges Mr. Bates with crimes occurring in 1990. At that time, 20 U.S.C. § 1097(a) defined criminal conduct as follows: "Any person who knowingly and willfully embezzles, misapplies, steals, obtains by fraud, false statement or forgery any funds . . . provided or insured under this subchapter . . . ."

Mr. Bates relies upon United States v. Kammer, 1 F.3d 1161, 1165 (11th Cir. 1993), to argue that, with respect to a charge under § 1097(a), "[t]o establish a criminal misapplication, the government must prove (1) a conversion of the property to the use of the defendant or a third party, and (2) fraudulent intent." United States v. Kammer, 1 F.3d at 1165. Mr. Bates contends that the indictment does not allege facts supporting these essential

elements.

The government responds that the Kammer court's interpretation of the essential elements of § 1097(a) is erroneous. The government contends that the elements necessary to prove the charge of misapplication of funds under § 1097(a) are: (1) that the funds described in the indictment were provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code at the time alleged; (2) that the defendant misapplied such funds; and (3) that he did so knowingly and willfully. The government defines "misapplication" to mean a conversion of funds to the defendant's own use or the use of another.

The government's version of the essential elements restates the elements as they are stated in § 1097(a), but the controversy between Mr. Bates and the government lies in the definition of misapplication of funds. Both parties argue, and the court agrees, that a misapplication requires a conversion, but the parties dispute whether a misapplication under § 1097(a) also requires fraudulent intent.

The government contends that the Seventh Circuit does not always require an intent to defraud with respect to statutes that forbid "misapplication of funds," citing United States v. Brown, 742 F.2d 363 (7th Cir. 1984). Applying 18 U.S.C. § 665 of the Comprehensive Employment and Training Act ("CETA"), the Brown court stated that:

> In United States v. Tamargo, 637 F.2d 346[, 350] (5th Cir.), cert. denied, 454 U.S. 824 (1981), the court approved the trial court's use of a jury instruction that stated that "misapplication of funds" for purposes of §

> 665 meant the conversion of funds to the defendant's own use or the use of another.

742 F.2d at 366. The Brown court said no more regarding the term's definition. The Brown court, however, omitted a critical clause from Tamargo's definition of misapplication of funds, for Tamargo actually states that, "The trial court here properly charged the jury to "misapply money or property means a willful conversion or taking of such money or property to one's own use and benefit or the use and benefit for another, with intent to defraud." United States v. Tamargo, 637 F.2d at 350 (emphasis added). Accordingly, the quoted language from the Brown case has little influence.

Nevertheless, the court is hesitant to follow the Kammer case. The essential elements stated in the Kammer case were derived from United States v. Jakeway, 783 F. Supp. 590, 597 (M.D. Fla. 1992), in which the court explained that although the Eleventh Circuit had not defined "misapplication" in the context of § 1097(a), the term had been defined in the context of 18 U.S.C. § 656, which deals with misapplication of funds by a bank officer or employee. United States v. Jakeway, 783 F. Supp. at 597, n. 6. Thus, the Jakeway court extrapolated the elements of criminal misapplication from United States v. Acosta, 748 F.2d 577, 580 (11th Cir. 1984), which held that misapplication under 18 U.S.C. § 656 is the "willful taking of an insured bank's money by its employee with intent to defraud the bank." United States v. Acosta, 748 F.2d at 580. Therefore, the Kammer holding is founded upon an earlier holding that, under a different statute,

misapplication required fraudulent intent.

The Seventh Circuit has not defined "misapplication" with respect to § 1097(a), but, like the Eleventh Circuit, requires a finding of intent to defraud or injure with respect to misapplication of bank funds under 18 U.S.C. § 656. United States v. Crabtree, 979 F.2d 1261, 1266 (7th Cir. 1992), cert. denied, 114 S. Ct. 217 (1993) (to prove a violation of 18 U.S.C. § 656, the government must prove, among other things, that the defendant willfully misapplied funds of the bank with the intent to injure or defraud the bank).

This does not necessarily compel a conclusion that § 1097(a) also requires fraudulent intent. The fraudulent intent element required under 18 U.S.C. § 656 has a historical basis in the statute itself:

> The current statutory language does not expressly require any proof of intent. Originally the statute did require proof of intent to "injure or defraud" the bank or "deceive" a bank officer but these words were inadvertently dropped in the course of a technical revision of the criminal code. To avoid making every unauthorized loan by a bank officer a willful misapplication of bank funds, courts, including our own, read the missing words back into the statute.

United States v. Bates, 852 F.2d 212, 215 (7th Cir. 1988); see also United States v. Angelos, 763 F.2d 859, 861 (7th Cir. 1985); United States v. Shively, 715 F.2d 260, 266 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984) ("these words were dropped by a reviser without intent to alter the meaning of the law").

In United States v. Garcia, 751 F.2d 1033 (9th Cir. 1985), however, the Ninth Circuit affirmed the dismissal of an

indictment for "wilfully misappl[ying]" CETA funds in violation of 18 U.S.C. § 665 because the government conceded it could not prove intent to injure or defraud. United States v. Garcia, 751 F.2d at 1034. In concluding that § 665 requires a specific intent to injure or defraud, the district court had relied on the Ninth Circuit's interpretation of the bank fraud statute, 18 U.S.C. § 656. Id. at 1036. On appeal, the government contended that the analogy between § 656 and § 665 was not compelling because, as discussed above, the original version of § 656 expressly required an intent to injure and defraud the bank, and Congress had expressly disclaimed any intention of changing the law. Id. The Ninth Circuit rejected this contention, stating:

> But this circumstance cuts against the government's reading of the statute. The only reason Congress could have considered the explicit requirement of a purpose to injure or defraud redundant was that Congress understood the term "willful misapplication" to include such an intent by implication.

Id.

Thus, the Ninth Circuit held that a "willful misapplication" for the purposes of § 665 necessarily includes an intent to defraud or injure. In doing so, the court reasoned that:

> In a criminal statute, "willfully" generally means a voluntary, intentional violation of a known legal duty in bad faith or with evil purpose. See United States v. Pomponio, 429 U.S. 10, 11-12 (1976) (per curiam); United States v. Bishop, 412 U.S. 346, 260 (1973). A general intent to commit the proscribed act is not enough; a specific intent to do something the law forbids is required. See United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). The definition of "misapplication" suggests a similar element: "[i]mproper, illegal, wrongful, or corrupt use [or] application of funds, property, etc." Black's Law Dictionary 901 (5th Ed. 1979).

Id. at 1035; see also Morissette v. United States, 342 U.S. 246, 276 (1952) (holding that "knowingly converts" under 18 U.S.C. § 641 required an intention "wrongfully to deprive another of possession of property.").

The Ninth Circuit gave much importance to the fact that the term "willfully misapply" in 18 U.S.C. § 665(a) "is embedded in a series of words referring to harmful or wrongful acts clearly causing financial injury to the United States or impeding the achievement of CETA's goals. All the acts prohibited by the statute are more serious in character than simple violations of procedural requirements." United States v. Garcia, 751 F.2d at 1035-36; see also United States v. Hammen, 977 F.2d 379, 384 (7th Cir. 1992) (in a 18 U.S.C. § 656 case, "[t]he intent to defraud or injure the bank is what separates criminal misapplication from mere maladministration."); United States v. Bates, 852 F.2d at 215 (stating that courts read the intent to defraud or injure back into 18 U.S.C. § 656 "[t]o avoid making every unauthorized loan by a bank officer a willful misapplication of bank funds.").

Similarly, the term "misapply" in § 1097(a) "is embedded in a series of words referring to harmful or wrongful acts clearly causing financial injury to the United States . . ." United States v. Garcia, 751 F.2d at 1035. Further, as was the case in Garcia under 18 U.S.C. § 665, "[a]ll the acts prohibited by [§ 1097(a)] are more serious in character than simple violations of procedural requirements." United States v. Garcia, 751 F.2d at 1036.

The court finds the reasoning of Garcia persuasive, and

thus elects to follow the course of United States v. Kammer, 1 F.3d 1161 in holding that, with respect to a charge under § 1097(a), "[t]o establish a criminal misapplication, the government must prove (1) a conversion of the property to the use of the defendant or a third party, and (2) fraudulent intent." United States v. Kammer, 1 F.3d at 1165. Thus, the essential elements of a willful and knowing misapplication under § 1097(a) include: (1) that the funds described in the indictment were provided and insured under subchapter IV of Chapter 28 of Title 20 of the United States Code at the time alleged; (2) that the defendant willfully and knowingly misapplied such funds; and (3) that he did so with an intent to injure or defraud the United States. A defendant misapplies funds by converting them to the defendant's own use or the use of another.

Mr. Bates contends that the indictment is defective because it does not allege facts supporting a finding that the defendant's actions constitute violations of § 1097(a). He contends that the indictment fails to recite all of the essential elements of a willful and knowing misapplication under § 1097(a). An indictment is sufficient if it "(1) states all the elements of the offense charged; (2) informs the defendant of the nature of the charge, enabling the defendant to prepare a defense; and (3) enables the defendant to plead the judgment as a bar to later prosecution for the same offense." United States v. F. J. Vollmer & Co., 1 F.3d 1511, 1518 (7th Cir. 1993), cert. denied, 114 S. Ct. 688 (1994) (citing United States v. James, 923 F.2d 1261, 1265 (7th

Cir. 1991). "Generally, an indictment is sufficient when it sets forth the offense in the words of the statute itself, as long as those words expressly set forth all the elements necessary to constitute the offense intended to be punished." United States v. Hinkle, 637 F.2d 1154, 1157 (7th Cir. 1981); see also United States v. Beard, 713 F. Supp. 285, 289 (S.D. Ind. 1989).

Under this standard, the indictment is insufficient on its face. Each count of the indictment fails to state an essential element of § 1097(a): that the defendant misapplied protected funds "with an intent to injure or defraud the United States." As such, the indictment must be dismissed.

For the reasons stated above, the court GRANTS Mr. Bates' motion to dismiss indictment (filed February 7, 1995 (#19)), and VACATES the status conference scheduled for April 21, 1995.

SO ORDERED.

ENTERED: April 17, 1995

Robert L. Miller, Jr., Judge
United States District Court

cc: R. Hennage; C.R. Oren